

803 CMR 1.23

Hearing Examiner's Decision as the Final Sex Offender Registry Board Decision

(1) The Hearing Examiner's decision shall be the final Sex Offender Registry Board decision, except as expressly provided herein. For purposes of judicial review, this decision shall be considered the final agency action, except as expressly provided herein.

(2) To ensure that Hearing Examiner decisions accurately reflect the interpretations of the Full Board, and because the Board, unlike the offender, has no mechanism for seeking direct judicial review of Hearing Examiner decisions, Full Board review of such decisions is available to address potentially erroneous decisions. Pursuant to this regulation, the Board can address and correct any decision that may be based upon an error of law, made upon unlawful procedure, unsupported by substantial evidence, unwarranted by facts found by the Hearing Examiner, or is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

The Board's General Counsel or person who presented the Board's position at the hearing may, within thirty (30) days of issuance of the Hearing Examiner's decision, and with the approval of the Board's Chairperson, file a written request for Full Board review of any finding or ruling reached in such decision, identifying the finding or ruling at issue, the reasons it is erroneous, the reasons why review should be granted, and any additional materials the Full Board might need to fully understand the issue. The filing of such a request shall not stay the effect of the decision or alter the time for the offender to seek judicial review of the decision. A copy of such request shall be mailed, in the same manner as was the Hearing Examiner's decision, to the offender and any other person required to be notified under 803 CMR 1.25(1), but shall not include any notice of availability of judicial review. The offender or his Authorized Representative may file a response to such request within fourteen (14) days, addressing any or all of the matters contained in the request.

(3) The Full Board shall thereafter determine whether to grant the request for review and shall notify the Parties of its determination in the same manner as under 803 CMR 1.25(1), but without any notice of availability of judicial review.

(4) If the Full Board grants review, the hearing shall be deemed re-opened, and if any action for judicial review is pending, the attorney representing the Board in such action shall promptly so notify the reviewing court. The Full Board may decide the issue presented based on the request and response; or may review additional materials identified in the request and/or the response, and/or may order the Parties to file additional memoranda of law or other materials, before deciding the issue. The Full Board shall issue a written review decision deciding the issue and shall notify the parties of its decision in the same manner as under 803 CMR 1.25(1), but without any notice of availability of judicial review except as provided in sub-paragraph (6)(a) below. If an action for judicial review of the Hearing Examiner's original decision is pending, the attorney representing the Board in such action shall promptly notify the reviewing court of the review decision. Subject to court rules, the attorney may make any appropriate motion, tailored to the relationship between the original decision, review decision, and status of the action for judicial review, to facilitate orderly resolution of the action.

(5) If the Full Board decides that there was no error, or that any error did not affect the Hearing

Examiner's registration or classification decision, the Full Board review decision shall so state.

(6) If the Full Board decides that there was error that affected the Hearing Examiner's registration or classification decision or both, the Full Board may proceed as set forth in either of the two following sub-paragraphs:

(a) The Full Board may issue a review decision that alters the Hearing Examiner's registration or classification decision or both. Such review decision shall, together with those parts of the Hearing Examiner's decision with which it is not inconsistent, constitute the final Sex Offender Registry Board decision, and, for purposes of judicial review, shall be considered the final agency action. A copy of such review decision shall be mailed, in the same manner as was the Hearing Examiner's decision, to the offender and any other person required to be notified under 803 CMR 1.25(1), and shall include notice of the availability of judicial review. If an action for judicial review of the Hearing Examiner's decision is already pending, the notice shall be appropriately tailored to the status of that action. Such review decision shall otherwise be subject to 803 CMR 1.00, in the same manner as a Hearing Examiner decision, to the extent apt.

(b) The Full Board may remand the matter to the Hearing Examiner for such additional proceedings as the Full Board deems appropriate. A copy of such review decision shall be mailed, in the same manner as was the Hearing Examiner's decision, to the offender and any other person required to be notified under 803 CMR 1.25(1), but shall not include notice of the availability of judicial review. The Hearing Examiner shall thereafter proceed in accordance with the Full Board's review decision and shall issue a decision that either supplements or supersedes the Hearing Examiner's original decision. A supplemental decision shall, together with those parts of the original decision with which it is not inconsistent, comply with 803 CMR 1.22, and a superseding decision shall comply with 803 CMR 1.22. Any such supplemental or superseding decision shall otherwise be subject to the remainder of 803 CMR 1.00, including this regulation, in the same manner as an original Hearing Examiner decision. If an action for judicial review of the Hearing Examiner's original decision is already pending, the notice of availability of judicial review of the supplemental or superseding decision shall be appropriately tailored to the status of that action.

(7) In any case where Full Board review has been requested, and where an action for judicial review of a final decision is pending or is subsequently filed, the attorney representing the Board in such action shall at the appropriate time include, in the record or a supplemental record to be filed with the reviewing court, documents relating to the request for review. These shall include the request, any response thereto, the Full Board determination of whether to grant review, its review decision if any, and any other materials issued or considered by the Full Board but not otherwise part of the record.

(8) This regulation shall apply to Hearing Examiner Decisions issued at any time after the effective date of this regulation.